No. 21175 A-F
No. 22316

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of THE CALLAND CORPORATION, a corporation,

Debtor and Appellant,

vs.

UNITED INSURANCE COMPANY OF AMERICA, WILLIAM N. BOWIE, JR.,

Appellees.

PETITION FOR REHEARING.

A. V. FALCONE,
416 West Eighth Street,
Los Angeles, Calif. 90014,
MAdison 7-7104,
Attorney for Appellant and Petitioner.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 685-9790

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

No. 21175 A-F
No. 22316

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of THE CALLAND CORPORATION, a corporation,

Debtor and Appellant,

vs.

UNITED INSURANCE COMPANY OF AMERICA, WILLIAM N. BOWIE, JR.,

Appellees.

PETITION FOR REHEARING.

To the Honorable: Ben C. Duniway, Circuit Judge, Walter Ely, Circuit Judge, Fred M. Taylor, District Judge:

Appellant hereby respectfully petitions for a rehearing to reconsider the judgment entered in this action on March 13, 1969, on the following grounds and on the following points of law and fact overlooked or misapprehended.

I.

The Points of Law and Fact.

Preface.

It is appellant's position that each of the at least seven orders by the Referee, affirmed by the District Court's orders, considered separately, are erroneous and abuses of discretion but that the singular circumstances of this case requires that the said orders be further considered in context and the this case particularly (as all cases generally, in appellant's view) should be considered in its entirety.

The first order was preceded by substantial proceedings which separately and cumulatively resulted in the first order and the adverse consequences to appellant therefrom. The subsequent orders involved proceedings all of which, except two, were initiated either by United or the receiver and merely completed United's acquisition of appellant's property.

Appellant's proceedings before the Referee were serious, followed statutory and case law requirements, and were specifically based upon the record. Appellant's petitions for review similarly followed statutory and case law and were precisely made, seriously presented and seriously argued. Each of appellant's appeals was made within the statutory period and was a matter of right. They were similarly seriously and substantially presented with citations of applicable state and federal authorities and with explicit reference to the record. The record was complex and voluminous, since there were numerous and voluminous documents, numerous hearings, partial transcripts only since appellant has been without any funds. As this Court pointed out, there are some 61 general unsecured creditors (Op. 4). These were workmen and materialmen who constructed appellant's apartments and were unpaid. It was on their behalf that appellant took all its proceedings. Neither

appellant nor its attorney had any other "axe" to grind. Appellant had no funds. Its attorney was not paid any fees or costs except for some very small part of the latter. He alone was familiar with the record and he alone did all the work. This had to be fitted into his calendar despite the fact that his regular clients and regular calendar were subordinated to this case on many occasions. Appellant's attorney is not a tyro. This is not his first federal or state appeal. The extensive record regarding the seven orders were epitomized but were sufficiently substantial and correct as to present the full record. This was a considerable task. There was *patently* substantial research and preparation, and in the opinion of appellant and its attorney the issues raised and the contentions made are substantial and supported by authority. This Court's opinion affirming the orders was, of course, disappointing to appellant and to its represented creditors but was a foreseeable result. However, this Court's consideration and decision of the issues and points raised by appellant were such that it appears to appellant that it failed to present the proper perspective and interrelationship and total consequences of the seven orders. Appellant and its attorney feel that the history of this case and appellant's and its attorney's efforts for the benefit of all the 61 general creditors, and the seriousness of the issues they raised, supported by the authorities cited, do not justify this Court's expressed reflection upon them, and appellant's counsel would be remiss in his professional duty not to state that opinion and to further state that it is unfair to counsel (who has dedicated 38 years to the practice and whose practice has been marked by the seriousness and quality of his ability and efforts in all judicial levels, trial and appellate, and noted by the records therein) to receive for his efforts in this case, not compensation from his client, not at least an acknowledgment of the objective of his services but a categorizing thereof as an "inexcusable performance". The only "basis" for this is that appellant has taken the proceedings accorded it by statute and case law and opposed United and questioned the correctness of the Referee's and the District Court's orders. Lese majesty

is not part of our law. This Court's said view of this case indicates that appellant has not adequately presented to it the serious matters, some of first impression, which appellant has presented and which will be partially restated *infra.* Since each appeal was taken within the proper time, this Court could only refer to appellant's applications for extension of time. Each application was made and submitted to this Court. Each application was granted in the Court's exercise of its discretion. Appellant's motion to consolidate the appeals was granted. United's motion to dismiss the first two then pending appeals, was denied. The Court granted appellant leave to proceed on the original record and by typewritten briefs. Since appellant could not furnish the $75,000 appeal bond fixed by the District Court for it did not have even 75¢, no detriment resulted to United. Further, United took numerous subsequent proceedings with favorable orders by the Referee and the Distict Court, and these further permitted it to accomplish its objective, and accordingly no detriment resulted to it. This Court in granting the extensions obviously considered the burden on appellant and its attorney, and its orders granting extensions were salutary and consistent with the basic concept of a "full day in court". Accordingly, neither the applications nor the orders for extension were improper. This Court's opinion creates a strange anomaly in that in criticizing appellant it criticizes itself or more properly the orders of a different judge. In this case most, if not all, orders were granted by Chief Judge Chambers. The applications granted by this Court were not and cannot be considered improper. Appellant's pursuit of its available remedies was not and could not be an abuse of judicial process. It is respectfully submitted that to in effect state that sanctions should be imposed but that they will not be because of this Court's "improvidence" is equivalent with charging and condemning without the opportunity to determine factually and legally whether the conduct warrants the same. This is so because the opinion does not state appellant's position as presented by it. This, unfortunately, is due to the complexity of the matter.

II.
This Court's Opinion.

The opinion indicates some of appellant's points of fact and law which were overlooked or misapprehended.

This Court states (Op. 1) appellant was unable to keep up payments to United.

This overlooks the fact that the original arrearages were caused by the malfeasance of appellant's officers, and thereafter a *new agreement* was made by its new officers and United, which they performed, paying in *excess of $62,000,* in reliance thereon. (O.B. 8). The subsequent defaults were by Cohen, who was accepted and recognized as the owner by United despite appellant's rescission of its contract to see to Cohen and over its objections.

Appellant raised the point, which this Court does not consider in its opinion, that appellant could not be held responsible for Cohen's defaults in his said new agreement with United.

This Court refers (2) to appellant's claim of "fraud . . . and various other heinous practices on the part of appellees and others". Other than its statement of United's concealment of the status of Dunnigan when it had him appointed state receiver contrary to California CCP 566 (which is a species of fraud) and its breach of its agreement with appellant (which is a species of fraud only if it entered the agreement with the intention of performing it), and its obstruction of appellant's efforts to obtain refinancing or sale (which, technically, is not fraud), appellant's statements of United's acts are not covered by the Court's said statement. Crim's incompetency is; the receiver's bias and mismanagement are; his and United's bad faith are; United's estoppel is; "heinous" applies only to Cohen.

This Court states (2) that the record is contrary to appellant's claim that it was not given sufficient opportunity to show it was not in default. Appellant respectfully submits the record shows there *never was any hearing* on the merits. This was what appellant was entitled to and not the academic opportunity to do so.

It is appellant's position also that it was not even given that opportunity.

This Court states (2) that as to appellant's claim that United was estopped to foreclose because it had promised not to do so if appellant performed, the "short answer" was that appellant did not perform. This is incorrect. The record shows that it performed at least to the extent of $62,000 as to United (O.B. 8) and additionally as to others (O.B. 9). There is misapprehension here in that Cohen's default with resulting increase in the balance due, which was permitted and, in fact, aided by United, is attributed to appellant, which was excluded by United.

This Court states (2) that appellant claims that there was a *novation* consisting of appellant asking United to cooperate with Cohen by giving him additional time to make the payments, and United agreed to do so. This is a serious misapprehension. That is *not* what appellant contends was a novation. What appellant contends was a novation was the *separate written* agreement between Cohen and United with which appellant had nothing to do and, in fact, had no knowledge of its contents, United refusing to disclose the same; further, United's treatment of Cohen as the owner and its refusal to recognize appellant's rights. This Court's statement that its claim of novation is "frivolous", is unfortunate particularly in view of its citation of *Fountainbleau Hotel Corp. v. Grossman*, 5 Cir. 1963, 323 F. 2d 937. *Fountainbleau* involved a plaintiff-tenant who had obtained a lease from the hotel for the exclusive right to sell women's apparel and his agreement with defendant-tenant for the latter to have a certain right to sell certain items within plaintiff's area. The agreement was *not* between the lessee and the hotel but between the lessee and his sublessee. In this case, of course, the agreement was between United, as the trust deed holder, and Cohen, whom it recognized as the owner, intentionally excluding appellant, and United changed the terms of Cohen's payments under the trust deed. *The primary right was the same, i.e., the trust deed, but United accepted another obligor, i.e., Cohen, and excluded appellant. Fountainbleau* involved Florida law. Appellant cited California law which sup-

ported its contention (O.B. 84-85). However, the following language in *Fountainbleau* supports appellant:

> (in defining "novation" it said, ". . . a substitution of a new contract between the same parties with the intention of extinguishing the old contract; the original obligor is freed from his obligation, but his contractual right must be intentionally relinquished, waived *or replaced by another right or by another obligor under the same right*" (*i.e.* Cohen).)

This Court states (2) that appellant claims United was in bad faith in giving Cohen time but not appellant. "frivolous". First, this was just *one* factor in the chain of elements regarding United's conduct. This *was* a *fact* but it was illustrative of the separate agreement and novation between United and Cohen. It should be noted the Court in *Fountainbleau* did not consider that appeal frivolous.

This Court states (2) that appellant complains that repair bills were increased and "now complains" the receiver paid no taxes and made no improvements. There is nothing inconsistent in these statements. Again, there is obvious misapprehension here. Appellant stated that the operating expenses increased while the rentals and income decreased, *i.e.*, that it cost more to operate 50 apartments than 98. 21 apartments were damaged by Cohen but were not repaired to make them rentable. Appellant complained of this. Also, the nonpayment of taxes. Appellant cited authorities that both were required and the receiver was duty bound to do so. Yet this Court merely mentioned the item without deciding appellant's point. This Court states (2) that the relevance of the claim escapes it. Its relevance has been noted. If it is the duty of the receiver to maintain the property and he does not do so, as a result of which it deteriorates and appellant suffers, it is not only relevant but crucial. This Court then states (2) that the receiver could believe that appellant had no equity in the property. The receiver had knowledge of the various appraisals from 1,500,000 and the 1,125,000 appraisal United obtained on which it made its 700,000 loan *before construction,* as well as the Parr escrow for $900,000, which, admittedly, was sufficient to pay all

obligations. The serious point is that appellant was so close to solution of its problems if the Parr escrow had been handled properly.

This Court states (2-3) that the only evidence appellant introduced regarding United's obstacle to refinancing was a declaration which was multiple hearsay. Again, this is obvious misapprehension. As appellant pointed out, it was *not* hearsay since declarant was stating *his* personal firsthand experience. He approached financial sources who had been either told by United or were repeated United's statements. Declarant was stating the fact that he could not obtain financing from his sources for that reason. This is not hearsay. The further point is that this should have been considered by the Referee with all the usual facts in full hearings.

This Court states (3) that appellant's contentions regarding United obtaining Dunnigan's appointment as state receiver were "completely outside the record". This, again, is the result of misapprehension. It was not outside the record. It was within appellant's documents before the Referee. This Court states that its relevancy also escapes it. It is submitted that for reasons noted in the briefs, in a discussion of Dunnigan, it was not only relevant but crucial and a critical issue, among other things, of estoppel.

Referring to Menick and his testimony, this Court states (3) the Referee was not required to accept the valuation of appellant's appraiser. This is generally true, subject to the limitation that a court cannot arbitrarily reject competent evidence. However, the real point is whether Menick's testimony was competent. Appellant presented substantial authorities to the contrary.

The Court then discusses (3) the questionable "heart" of the first appeal. This Court concludes its discussion with the statement that "Appellant thus had more than nine months to come up with a plan or a buyer". Again, there is misapprehension here. Some time was consumed in various proceedings attempting to ascertain the status of the receiver's operation. As the Referee himself conceded (O.B. 34), the pending proceedings and circumstances had "a tendency to hurt the

property which people think they can come in and take advantage". The difficulties in obtaining refinancing and sale because of United's obstruction were noted in the briefs. The damages to appellant's property and the decrease in the occupancy from 98 to 50 was also noted; from 98 to 71 during Dunnigan's receivership and from 71 to 50 during the Chapter XI proceedings! These were not normal conditions and they prevented normal transactions. This is what appellant stressed, *i.e.,* that the Court under Chapter XI exercised equitable powers for the purpose of doing justice to all interested parties. This Court cited *Mundt v. Home Federal Savings and Loan Association,* 9 Cir., 1965, 349 F. 2d 938. *Mundt* is factually and legally distinguishable (C.B. 33-34). Appellants' contention in *Mundt* was that they were denied the constitutional right to appointment of counsel to represent them in the bankruptcy proceedings. The only, tenuous, relevancy of Mundt is this Court's determination that there was no abuse of discretion shown. This Court did not consider that appeal frivolous. This Court refers (3) to the fact that the District Court, in affirming the first order, stayed proceedings subject to appellant's filing a bond. It does not state that the bond was for $75,000 and that all appellant's assets were in the possession of the receivers and it had nothing with which to do so. It does not state that appellees strenuously argued that because appellant could not do so its appeal should be dismissed, an interesting and serious point. This Court states (3) that its consideration of the first appeal disposed of the second, third, fourth and seventh appeals.

This, again, is misapprehension. The second appeal was from an order authorizing the receiver to reduce the rents. Nothing involved in the first appeal relating to the first order, which was distinct in time and subject, related to the order involved in the second appeal (except in the sense all orders had a common eventual result), and, accordingly, this Court's treatment of the first appeal could not dispose of the second. The third appeal was from an order directing the receiver to relinquish possession to United, a fact which had already been accomplished about a month previously; the real purpose of that proceeding, however, was to obtain the Referee's finding that the sale to United, the previous

month, was valid and that it acquired title. *These were not issues at all and were beyond his jurisdiction.* Appellant substantially discussed this question. This Court has not considered it. The fourth appeal involved appellant's motion to remove the receiver. Appellant extensively covered this (O.B. 97-105). It submits that this is a most serious and important issue and is worthy of full consideration and statement by this Court. The seventh appeal involved the Referee's order denying appellant's motion for an order directing the trustee to defend United's state court action to quiet title to its property under circumstances which no one can deny constituted a predetermination (O.B. 67-75).

This Court refers (3) to the fifth appeal and states the Referee was correct in his ordering the insurance draft paid to United because the trust deed had a pertinent provision in that regard. Again, this is misapprehension. Appellant's position is that United had purchased the property "as is" under its deed of trust which merged into its "title" and, accordingly, it no longer gave United any such rights (O.B. 60-63; 80; 195).

This Court states (4) the sixth appeal was "also frivolous"; that appellant had not obtained consent from its creditors and had not made any deposits, and there was no error, citing *In re Webcor, Inc.,* 7 Cir., 1968, 392 F. 2d 892. This is clearly misapprehension. Appellant's position was that when a debtor in its situation cannot make any deposits since all of its assets are in the receiver's possession, there can never be a plan submitted by anyone in the same or similar position and that this is not the proper consideration and application of Chapter XI (O.B. 63-67; 83; 106). *Webcor* is factually and legally distinguishable. The failure to file a plan therein was held to be attributable to dilatory tactics (pt. 2). The Court cited *S.E.C. v. American Trailer Rentals,* 379 U.S. 594, 618, to the effect

> ". . . Chapter X and XI were not designed to prolong—without good reason and at the expense of the investing public—the corporate life of every debtor suffering from terminal financial ills" (pt. 1).

Obviously there were good reasons in this case, there was no investing public involved. The Court in *Webcor* did not consider the appeal frivolous, and appellant's financial ills were not "terminal".

This Court overlooks the fact that despite the appraisals of 1,500,000 to Menick's $850,000 United purchased the property for $700,000; that there were no other bidders because of United's acts noted in the briefs. It is submitted that this clearly shows the injustice and inequity involved and that United and not appellant has abused the processes of the Court. It is submitted that considering even Menick's *unqualified opinion* of $850,000 value and the Referee's finding of $875,000 value, United's purchase of the property for $700,000 under those circumstances, for $170,000 less than the Referee found it to be worth under the adverse conditions involved, is eloquent confirmation of appellant's position.

This Court's last paragraph (4) has been discussed *supra.*

Conclusion.

It is a permissible conclusion by appellant that its presentation of the seven appeals, in the form and content of its briefs, carefully prepared and seriously presented, did not properly present the appeal to this Court and as a result of which the Court has overlooked those and other points of facts of law and has misapprehended them. The correct presentation of appellant's position is determinable from its Specification of Errors, in its opening brief, and in its argument therein. It was confirmed by appellant's reply to appellee's brief.

Unless equity has no place in bankruptcy and particularly Chapter XI, and unless justice is merely an abstract word, then reasons for applying both adequately exist in the record, and appellant again urges their application on behalf of the 61 unpaid workmen and materialmen appellant represents.

Dated: March 26, 1969.

Respectfully submitted,

A. V. Falcone,

Attorney for Appellant and Petitioner.

Undersigned counsel certifies that this petition is not interposed for delay and that, in his judgment, it is well founded.

Dated: March 26, 1969.

/s/ A. V. Falcone
A. V. Falcone
Attorney for Appellant and Petitioner
Suite 910 Commercial Exchange Bldg.
415 West Eighth Street
Los Angeles, California, 90014